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In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-619

H. CALLOWAY POLLARD, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The memorandum of the court of appeals (Pet. App. A, p. 1a) is unreported. The opinion of the district court (Pet. App. A, pp. 4a-13a) is reported at 367 F. Supp. 844.

JURISDICTION

The judgment of the court of appeals was entered on September 23, 1974, and a petition for rehearing

was denied on October 23, 1974 (Pet. App. A, p. 2a). The petition for a writ of certiorari was filed on November 20, 1974. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether an indictment charging willful misapplication of bank funds must state that the accused converted the funds to his own use.

2. Whether the court must charge the jury that in order to convict petitioner of willful misapplication of bank funds, it must find that the bank was subjected to a risk of foreseeable loss.

3. Whether petitioner can challenge the procedure by which a bank, responding to a subpoena, turned over to a government agent records of corporations petitioner controlled.

4. Whether the failure of the court to order the recording of the grand jury deliberations violated petitioner's constitutional rights.

STATEMENT

A nineteen-count indictment filed in the United States District Court for the Middle District of North Carolina charged petitioner with conspiracy willfully to misapply bank funds (count 1) and with misapplication of the funds (counts 2 to 19), in violation of 18 U.S.C. 371 and 656. Following a jury trial petitioner was convicted on the conspiracy count and three of the substantive charges (counts 17 to

19). He was sentenced to a term of two years' imprisonment on count 1, and to concurrent terms of one year's imprisonment on counts 17 to 19, to run consecutively to the sentence on count 1. The court of appeals affirmed (Pet. App. A, p. 1a).

1. During the period covered by the indictment—January 1970 to June 1972—petitioner was a director of the North State Bank, Burlington, North Carolina. He was also a director, major shareholder, and officer of Ketteridge Industries, Inc., a failing men's clothing franchiser. In addition, petitioner controlled several other businesses, including two real estate companies, Burlington Real Estate and Home Builders of Alamance, Inc. (Tr. 83-84, 121-122, 135-136, 140).[1] Each of the corporations with which petitioner was associated maintained accounts with the North State Bank.

Petitioner was not involved in the daily affairs of the bank. Co-defendant Norman Graham Smith (who served as president and director of the North State Bank), co-defendant Marshall Stewart, and petitioner comprised the directorship of Ketteridge Industries (Tr. 122).

From mid-1970 until its doors were padlocked in 1972, Ketteridge experienced financial difficulties. The records of the North State Bank reflected numerous entries for Ketteridge in the bank's "insufficient" files, *i.e.*, computerized daily printouts of in-

[1] We are lodging with the Clerk of this Court the six-volume transcript of trial ("Tr.").

formation regarding checks presented for payment against insufficient funds (Tr. 87). Under the Uniform Commercial Code 4-301 (official ed. 1958), checks held by a bank beyond midnight of the next business day can not be returned through regular channels and become the responsibility of the holder. Such collectible checks against insufficient funds were recorded by the North State Bank in a "cash item" ledger. Although it violated bank policy to retain overdrawn checks, North State Bank's cash item ledger contained numerous entries for checks written by Ketteridge in substantial amounts (Govt. Exh. 5, 6; Tr. 91-92, 117-119, 488-495, 502-524). One survey, covering 63 banking days in January through March 1971, showed that Ketteridge's account was overdrawn daily by an average of more than $33,000 (Tr. 524).

2. On August 5, 1970, Max Sharpe, North State Bank's senior loan officer, discovered that Ketteridge's accounts were $388,000 in arrears, consisting of $178,000 from 22 check overdrafts, $130,000 in loans, and $80,000 on a franchise account. This amount far exceeded the $168,000 lending limit for any one client imposed upon the bank by Federal Deposit Insurance Corporation regulations (Tr. 117-126). Sharpe reported this situation to John Houser, the executive vice-president of the bank, and together they consulted co-defendant John Kernodle, North State Bank's chairman of the board (Tr. 127).

The following day, petitioner and Kernodle discussed the deficit at the bank and telephoned Smith for advice (Tr. 132, 133). At Smith's direction, the

bank executed a loan of $260,000 directly to Ketteridge Industries, and of $50,375 each to Home Builders and to Marshall Stewart, the president of Ketteridge; the loans to Stewart and Home Builders were unsecured. The proceeds of all three loans immediately were deposited in the Ketteridge account to offset its arrearages (Tr. 133-137). In order to comply with the $168,000 federal limit, North State Bank discounted $100,000 of the Ketteridge loan with a Virginia bank (Tr. 134-135). Although the loan transactions (but not the deposits of the proceeds) were reported on the loan audit list, which usually was reviewed by the board of directors of the bank at its monthly meeting, there was no discussion at any meeting by petitioner or any other party relating to the borrowing by Home Builders or Stewart for the benefit of Ketteridge (Tr. 143-144, 353, 401).

Thereafter, petitioner and others continued to make unsecured loans to satisfy Ketteridge overdrafts. On August 31, 1970, petitioner obtained $30,000 from the North State Bank for Ketteridge, executing a note on behalf of Burlington Real Estate (Tr. 140). On February 1, 1971, Stewart borrowed an additional $50,000 and immediately deposited it in the Ketteridge bank account to cover a portion of $64,000 in Ketteridge overdrafts (Tr. 148, 490). The latter loan was ordered by Smith, although bank employees knew that Stewart would be unable to repay it personally (Tr. 149-150). By February 12, 1971, the Ketteridge imbalance stood at $96,000. Smith's wife was issued a $50,000 unsecured loan, with the

bulk of the money deposited in the Ketteridge account (Tr. 145, 491-492).

3. On May 12, 1971, the Ketteridge account had an insufficient fund balance of $63,515.26 (Tr. 492). During that month, petitioner and Smith approached John J. Schopp, a shareholder in Ketteridge, and requested that he negotiate a loan to aid Ketteridge. Petitioner told Schopp that certain stockholders wanted to sell their shares; that petitioner, Smith, and Stewart intended to purchase the shares; and that during the "transition period" some capital was needed to "help them hold the line" (Tr. 325-327). Believing that he was to receive debentures offering 9 percent interest payments, Schopp agreed to sign for a $50,000 bank loan (Tr. 327). In fact, he never received any debentures and was compelled to make payment upon the loan, although he never had received any of the proceeds (which had been deposited in the Ketteridge account) (Tr. 327-330).

4. In the fall of 1971 Ketteridge was indebted to A. Elgart and Sons, a New York manufacturer, in the amount of $58,000. Needing funds, Benjamin Elgart, president of the New York company, contacted Stewart, who (along with petitioner and Smith) previously had signed personal guarantees for over $100,000 to Elgart. As a means of paying off the $58,000 debt the parties agreed that Elgart would negotiate two unsecured $29,000 loans from North State Bank, to be deposited first in the Ketteridge account and then paid to Elgart, and that subsequent Ketteridge checks payable to Elgart would be de-

posited to the Elgart account in the bank to offset the debt (Tr. 280). Two of the three members of the loan committee rejected the Elgart application. However, at the personal direction of Smith, the loan was made and approved by the board of directors (Tr. 474-476). Ketteridge was unable to repay the Elgart debt (Tr. 281-282).

5. In April 1972 Ketteridge was closed by its creditors. Later that same month, on April 24, petitioner obtained a $40,000 loan on behalf of Burlington Real Estate; the proceeds were deposited in the Ketteridge account (Tr. 494, 495). That same day another $26,000 was deposited in the Ketteridge account via an unsecured $50,000 loan in the name of Smith's wife (Tr. 494-495).

6. As a result of all of these activities, between August 7, 1970, and April 24, 1972, the North State Bank had loaned $762,250 to or on behalf of Ketteridge (Tr. 496-499). A large portion of this amount was written off as uncollectible when the North State Bank merged with another bank late in 1972 (Tr. 620-627).

7. Petitioner did not regard as his own the obligations he had incurred for his corporations on behalf of Ketteridge Industries.[2] When he came to the bank to renew personal and business loans and to make interest payments, petitioner did not pay the

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[2] The three substantive counts upon which petitioner was convicted deal with the Schopp loan (count 17), the Elgart financing (count 18), and the $40,000 loan to Burlington Real Estate on April 24, 1972 (count 19).

interest on the Ketteridge-associated obligations; instead, he directed the loan officer to contact Smith, the bank's president, to obtain satisfaction (Tr. 300-301, 313-314). When petitioner furnished the Small Business Administration with a financial statement he made no mention of his liabilities on the Ketteridge loans (Tr. 542-546).

On November 29, 1972, petitioner was interviewed by FBI Agent Thomas Brereton concerning this discrepancy. After being advised of his rights and executing a waiver of rights form, petitioner told Brereton that he did not regard the loans made on behalf of Ketteridge as his own obligations; that he had expected to receive debentures from Ketteridge for each of the loans made in the name of Burlington Real Estate or Home Builders of Alamance; that he knew that the proceeds of the loans had been used to offset the Ketteridge deficit balance; that Smith had kept him advised of Ketteridge matters, knowing that petitioner was a major Ketteridge stockholder; that he had no part in the August 7, 1970, handling of the $260,000 Ketteridge loan; and that he accepted the April 24, 1972, loan on behalf of Burlington Real Estate in the hope of reopening Ketteridge after the creditors had closed it down (Tr. 552-565).

ARGUMENT

1. Each of the substantive counts upon which petitioner was convicted charged that petitioner, a bank director, "with intent to injure and defraud

the said Bank, did wilfully misapply and cause to be misapplied monies, funds and credits of said Bank * * *" (Pet. 5). Each count then set out the details of a separate loan. Count 17 charged that the misapplication was effected by causing a $50,000 loan to be made to John J. Schopp, with the proceeds deposited to the Ketteridge account, "concealing the purpose for the loan and concealing the interest of H. Calloway Pollard * * *" (*ibid.*). Count 18 charged that the misapplication was brought about by causing a $29,000 loan to be made to A. Elgart and Sons; Count 19 involved a misapplication related to the April 1972 loan of $40,000 to Burlington Real Estate. In each count petitioner was charged with concealing the purpose of the loan and his interest therein.

Relying primarily upon *United States* v. *Britton*, 107 U.S. 655, petitioner contends that the substantive counts were insufficient to state an offense. In *Britton* this Court ruled that an indictment charging a bank official with willful misapplication of bank funds by using the funds to buy the bank's own shares was insufficient because the charge failed to contain language negating the possibility that the transaction was within the statutory exception permitting such purchases to prevent bank losses on a debt. 107 U.S. at 669-670. As petitioner notes (Pet. 13), the Court in *Britton* also stated that because the term "willful misapplication" was new and had no technical meaning, an indictment could not simply aver that a defendant "willfully misapplied" bank

funds without showing "how the misapplication was made, and that it was an unlawful one."

In the 90 years since *Britton* was decided, the law of willful misapplication has undergone substantial development through lower court constructions of that term. It is now generally accepted that "willful misapplication" encompasses acts not covered by the terms "embezzlement" or "abstraction," but that amount to unjustified use of bank funds beyond mere bad judgment or maladministration. *United States* v. *Wilson*, 500 F.2d 715 (C.A. 5); *United States* v. *Gens*, 493 F.2d 216, 221-222 (C.A. 1); *United States* v. *Fortunato*, 402 F.2d 79 (C.A. 2), certiorari denied, 394 U.S. 933. It has, therefore, acquired a technical meaning. Moreover, the common law requirement of technical pleading has been eliminated since *Britton* by Fed. R. Crim. P. 7(c). Accordingly, an indictment such as the one in this case, which charges a violation of 18 U.S.C. 656 by tracking the statute and in addition by setting out in detail the manner in which petitioner intended to injure and defraud the bank, is sufficient. It fully notified petitioner of the charge he was required to meet, and it protected him from double jeopardy. *Hamling* v. *United States*, No. 73-507, decided June 24, 1974, slip op. 27; *Hagner* v. *United States*, 285 U.S. 427.

Petitioner contends that, although some circuits have held that Section 656 now has acquired a "technical" meaning, others continue to hold that it has not. See cases cited at Pet. 14-15. Although we agree with petitioner that there is a verbal dispute, that

dispute does not affect the manner in which the courts dispose of cases and so is more semantic than real. For example, the First Circuit, after expressing in *Gens, supra*, the view that the statute had not yet acquired a fully-articulated technical meaning, went on fully to articulate such a meaning. 493 F.2d at 222. *United States* v. *Quinn*, 365 F.2d 256 (C.A. 7), another case cited by petitioner as declining to find a technical meaning in Section 656, nevertheless held that an indictment could be sufficient if it contained allegations of fact (as opposed to an explanation of law) sufficient to show that the willful misapplication of funds was effected by disguised procedures detrimental to the bank. Neither *Gens* nor *Quinn* required the indictment to set out in full the legal theories that would support a conviction; instead, both cases held only that it was necessary to set out facts sufficient to show that the transaction was not an innocent, "everyday" banking matter. The indictment in this case complied fully with Section 656 as construed by *Gens* and *Quinn*. As the district court concluded (Pet. App. A, p. 9a):

> The Court finds that the present indictments sufficiently inform defendants of how the alleged misapplication took place and indicate why it was unlawful. The Court cannot read these indictments and come to the conclusion that only an ordinary banking transaction is charged. These indictments allege conversion and concealment as essential ingredients of the transactions.

2. Petitioner also alleges that the district court's instructions to the jury were inadequate because they did not tell the jury that it must conclude that his transactions exposed the bank to a foreseeable risk of loss, but instead allowed the jury to convict him if it were convinced simply that there had been a violation of some state or federal bank rule or regulation. This contention is not supported by the record. The court's instructions on the conspiracy and substantive counts set forth the elements of each offense, defined "misapplication" as an unauthorized, unjustified or wrongful use of the bank's assets by any of several delineated methods, admonished the jury that an intent to injure or defraud the bank was a necessary element of the offense, and cautioned that the offensive conduct must exceed maladministration and misuse and must include a conversion of the bank's funds to the defendant's or another's use, specifically intending to injure or defraud the bank (Tr. 861-872). The charge therefore was adequate under even the most stringent definitions of the offense. See *United States* v. *Giordano*, 489 F.2d 327 (C.A. 2); *United States* v. *Mayr*, 487 F.2d 67 (C.A. 5), certiorari denied *sub nom. Windham* v. *United States*, 417 U.S. 914; *United States* v. *Hickey*, 360 F.2d 127 (C.A. 7), certiorari denied, 385 U.S. 928.

The cases relied upon by petitioner (Pet. 16), including *Giordano* and *Gens*, *supra*, do not compel a court to instruct that a risk to the victimized bank of probable and foreseeable loss from the misappli-

cation is a circumstance that must be found in order to convict. *Giordano* holds only that an intent to injure the bank is an element of the offense and that such intent may be demonstrated by the deliberate making of a loan not authorized by the bank's rules (489 F.2d at 331). *Gens* holds that the transactions must have some tendency to injure the bank and that this may be proved by demonstrating that the nominal borrowers were not credit-worthy or that the bank looked only to the third-party recipient of the proceeds for satisfaction. The government demonstrated both of those elements at the trial in this case. *Gens* does not stand, as petitioner would have it, for the proposition that the court must instruct the jury that the loan subjected the bank to a "probable and foreseeable loss" (Pet. 16).

3. Petitioner contends that there has been an abuse of the grand jury process because subpoenas directing the North State Bank to make available its records could be satisfied by delivery of the records to the Federal Bureau of Investigation. This contention is without merit. Each subpoena directed the Bank to produce its records before a session of a grand jury on a date certain;[3] the provisions in the subpoenas allowing the Bank to satisfy each sub-

[3] We are lodging with the Clerk of this Court a transcript of the hearing concerning the grand jury subpoenas, and of the Joint Appendix on appeal from the district court's order declining to prohibit the production of the subpoenaed materials before the grand jury. Copies of the subpoenas are reproduced at pp. 10a-13a of the Joint Appendix.

poena by providing the documents to the Federal Bureau of Investigation was for the convenience of the Bank, which otherwise would have had to undertake the burden of transporting the documents. The Bank itself chose to provide the records to Agent Brereton of the Federal Bureau of Investigation and was not compelled to do so by the subpoenas.[4]

In any event, petitioner has no standing to object to the production before the grand jury of the materials obtained through these subpoenas. None of the documents produced was owned by petitioner and the subpoenas did not direct the bank to produce any of petitioner's personal record. He therefore cannot object to their production. *California Bankers Association* v. *Shultz*, 416 U.S. 21, 55. If any rights were violated, they were those of the Bank.[5] Cf.

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[4] Petitioner's contention (Pet. 8-9) that the subpoenas were issued in blank to the Federal Bureau of Investigation and filled in by the Federal Bureau of Investigation is completely unsupported by the record. Assistant United States Attorney William L. Osteen represented in open court (Tr. July 10, 1973, p. 16) "that I caused the subpoenas to be issued. It was done under my direction and under my supervision * * *." There is no evidence to the contrary.

[5] Petitioner specifically disclaims any argument that the subpoenas invaded his personal Fourth Amendment right to be free of unreasonable searches or seizures (Pet. 9-10); he seeeks to invoke only the rights of the bank. This case therefore is not comparable to *United States* v. *Miller*, 500 F.2d 751 (C.A. 5), in which grand jury subpoenas were issued by the United States Attorney for the records of a specific individual, and that individual raised his own Fourth Amendment claim when the records were introduced at trial. Nor does petitioner contend that Fed. R. Crim. P. 17, which

Alderman v. *United States*, 394 U.S. 165, 174-175. And, even if the subpoenas were improper, the presentation of the materials to the grand jury is not a proper ground to dismiss the indictment. Illegally seized evidence may be used before a grand jury, and "the validity of an indictment is not affected by the character of the evidence considered." *United States* v. *Calandra*, 414 U.S. 338, 344-345.

4. As is customary in the Middle District of North Carolina, the deliberations of the grand jury were not recorded. Recognizing that Fed. R. Crim. P. 6 permits, but does not compel, recordation of grand jury proceedings, petitioner nevertheless asserts that he is entitled to recordation and a full transcript of grand jury proceedings because he might have been indicted on one theory of violating 18 U.S.C. 656 and tried under another theory. Petitioner is not entitled to review the grand jury proceedings to satisfy this curiosity. The language of the indictment serves as a safeguard against conviction on a theory not examined by the grand jury. The indictment against petitioner "on its face presents evidence which assures us that such essential elements were presented to the [grand] jury and deliberated upon by them in returning the indictment." *United States* v. *Silverman*, 430 F.2d 106, 111 (C.A. 2), certiorari denied, 402 U.S. 953. The extensive allegations in the conspiracy

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authorizes the United States Attorney to utilize subpoenas signed in blank by the clerk of the court, is improper or unconstitutional.

count, which encompassed as overt acts all 18 substantive charges, amply show what conduct was deemed offensive by the grand jury. Any points of clarification could have been resolved by a bill of particulars, which petitioner did not request. Nothing in the indictment or evidence at trial even remotely implies that, like the cases relied upon by petitioner (Pet. 20) (*e.g.*, *United States* v. *Beard*, 436 F.2d 1084 (C.A. 5)), the offense proved was not the offense charged.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the petition for a writ of certiorari should be denied.

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